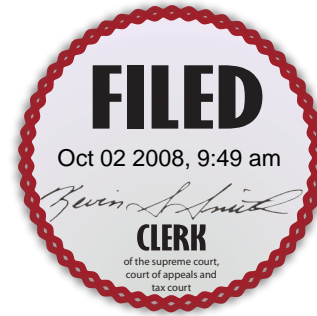


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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PHILLIP HERRON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0804-CR-365
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Mark Stoner, Judge  
Cause No. 49G06-0708-FC-169074

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**October 2, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellant-defendant Phillip Herron appeals a portion of the sentencing order entered after Herron pleaded guilty to Welfare Fraud,<sup>1</sup> a class C felony. Specifically, Herron argues that the trial court erred by ordering him to pay restitution in the amount of \$31,390 because (1) that amount is greater than the losses resulting from the crime to which he pleaded guilty, and (2) the trial court found Herron to be jointly and severally liable with his alleged co-conspirator, who was not ordered to pay any restitution. Finding that Herron agreed to these terms in his plea agreement, we affirm.

### FACTS

On August 17, 2007, the State charged Herron with two counts of class C felony welfare fraud, class C felony conspiracy to commit welfare fraud, two counts of class C felony theft, and class C felony conspiracy to commit theft. Doreathea Thompkins was charged under a different cause number with, among other things, being Herron's co-conspirator on the welfare fraud and theft charges.

On November 11, 2007, Herron pleaded guilty to one count of class C felony welfare fraud in exchange for the State's agreement to dismiss the remaining charges. In addition, the plea agreement provided as follows:

- a. Parties agree to a cap of four (4) years on any executed time. Any executed time will not be served in the Department of Corrections [sic].
- b. Defendant will pay restitution with the total amount to be capped at \$43,393.00;

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<sup>1</sup> Ind. Code § 35-43-5-7.

c. \$36,544.00 of the total restitution shall be joint and several with Doreathea Thompkins under Cause Number 49G06-0708-169075;

d. All other terms open to argument.

Appellant's App. p. 48 (font emphasis omitted). On January 4, 2008, Thompkins pleaded guilty to class D felony welfare fraud in exchange for the State's agreement to dismiss the remaining charges, including the conspiracy charges. She was not ordered to pay any restitution. Ex. K.

Following a February 28, 2008, sentencing hearing, the trial court sentenced Herron to two years, all suspended, and ordered Herron to pay \$31,390 in restitution to the Indianapolis Housing Authority (IHA). The trial court held Herron jointly and severally liable with Thompkins on the restitution award, notwithstanding the fact that she had not been ordered to pay any restitution. Herron now appeals.

### DISCUSSION AND DECISION

Although Herron pleaded guilty, he is entitled to contest the merits of the trial court's sentencing decision, inasmuch as the trial court exercised discretion in the sentencing process. Tumulty v. State, 666 N.E.2d 394, 396 (Ind. 1996). An order of restitution is within the trial court's sound discretion, and we will reverse only upon a showing that the trial court abused that discretion. Long v. State, 867 N.E.2d 606, 618 (Ind. Ct. App. 2007). An abuse of discretion occurs when the trial court misinterprets or misapplies the law. Myers v. State, 848 N.E.2d 1108, 1109 (Ind. Ct. App. 2006).

Herron first argues that the trial court erred in calculating the amount of the restitution award. Although there was evidence that the actual loss suffered by the victim

totaled \$31,390, the loss that resulted from the sole count of welfare fraud to which Herron pleaded guilty totaled only \$12,794. Thus, Herron contends that the trial court erroneously ordered him to pay restitution for losses resulting from crimes of which he was not convicted.

In support of this argument, Herron directs our attention to the following well-established rule: “Absent an agreement by the defendant, a trial court may not order restitution in an amount greater than the sums involved in those crimes to which the defendant actually pleaded guilty.” Kinhead v. State, 791 N.E.2d 243, 245 (Ind. Ct. App. 2003) (emphasis added). Here, Herron pleaded guilty pursuant to a plea agreement that stated that the restitution award would be capped at \$43,393. Appellant’s App. p. 48. Thus, notwithstanding the fact that the losses stemming from the crime to which he pleaded guilty totaled only \$12,794, Herron agreed that he would pay up to \$43,393 in restitution. Under these circumstances, the trial court did not abuse its discretion in ordering Herron to pay \$31,390 in restitution to IHA, the victim of his crime.

Herron next argues that the trial court erroneously ordered him “to pay restitution under Doreatheia Thompkins’[s] cause number.” Appellant’s Br. p. 7. From what we can glean from Herron’s argument, he finds fault with the fact that the trial court found him to be jointly and severally liable with Thompkins even though Thompkins had not been ordered to pay any restitution. Again, however, we note that Herron agreed in the plea agreement that “\$36,544.00 of the total restitution shall be joint and several with Doreatheia Thompkins under Cause Number 49G06-0708-FC-169075 . . . .” Appellant’s App. p. 48. At the time Herron pleaded guilty, Thompkins had not yet entered her own

plea agreement. Thus, he was taking a risk that she would not be ordered to pay restitution, but he agreed to the term anyway. As the trial court observed at the sentencing hearing,

that was the benefit of the bargain that the Defendant agreed to. Whenever you agree to joint and several liability you agree with the understanding that you may have to pay it all or you may end up paying none, depending on how you and your co-defendant's situation works out. As it turns out, based on the plea agreement and the findings here, it would appear that [Herron's] joint and several liability is going to mean that he is going to end up holding the entire amount of the \$31,390. The Court does note that [this] is one of the terms and possibilities that the parties agreed to [in the] plea agreement.

Tr. p. 101-02. We agree with the trial court's analysis—Herron agreed to joint and several liability, knowing that he could end up owing the full amount of the restitution award. Thus, the trial court did not abuse its discretion by enforcing the bargain struck by the parties and ordering joint and several liability on the restitution award.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.